United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

(42039)

ORIGINAL

74-2643

To be argued by
SUSAN S. BELKIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

MATTIE G. DIXON, as Administratrix of the Estate of L. C. SHERMAN, JR.,

Plaintiff-Appellee,

—against—

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP., RAISLER CORP., THE CONSOLIDATED EDISON CO. OF NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD L. STINARD, EMERY ROTH, RICHARD ROTH & JULIAN ROTH, d/b/a EMERY ROTH & SONS,

Defendants-Appellees,

—and—

DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK and LOUIS BECK (not an original party to this action),

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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(1)

Plaintiff-appellee's assertion (Pl.-App. Br., pp. 15-18) that the New York "Freedom of Information Law" mandates disclosure of the documents in question in this case is incorrect. In *Cirale* v. *80 Pine Street Corp.*, 35 N Y 2d

113, 117 (1974), Judge Jasen, writing for the majority of the New York Court of Appeals, stated (35 N Y 2d at 117): "Although the Legislature has recently passed the Freedom of Information Law (L. 1974, chs. 578, 579, 580), it does not abolish the common-law privilege for official information." If this Court applies the standard of determination stated in *Cirale* to the present case, it is clear that the material requested by the plaintiff and defendants in the present case is protected material under the New York common-law privilege of official information.

(2)

Plaintiff-appellee further claims that the equipment involved in the explosion is either missing or has been irreparably altered (Pl. App. Br., pp. 19-20). As stated on page 3 of our appellants' brief, the physical evidence, *i.e.*, "expansion joints and other apparatus and any other appurtenances which were examined by members of the Board of Inquiries or by experts at their request," is not in question in the present case, since that material was returned to the owner of the building after the Buildings Department finished its inquiry. Plaintiff-appellee's assertion that this material had been marred by destructive testing and that the plaintiff-appellee cannot ascertain how the material looked immediately after the explosion or the manner of removal of the equipment by the Department of Buildings employees, is not properly before this Court since it was not ruled upon by the District Court. We do not have information as to the veracity of appellee's allegations. It would require consultation with our own experts. If this Court feels that plaintiff-appellee's allegation is worthy of consideration, this part of the case should be sent back to the District Court for reconsideration.

(3)

Plaintiff-appellee also alleges that the City has waived its privilege since Mr. Aranow, an attorney in the Office of the Corporation Counsel, "stated to the litigants he would release the information and did in fact allow several parties to read and inspect the entire Board's report . . ." (Pl. App. Br., p. 22). We respectfully submit that this informal inspection by some of the parties during the *in camera* inspection by Magistrate Jacobs did not constitute a waiver of the common-law privilege of governmental "official information."

The cases cited by plaintiff-appellee in support of this allegation are not on point. In *Fireman's Fund Indem. Co.* v. *United States,* 103 F. Supp. 915 (N.D. Fla. 1952), the United States Navy was a party to the action. The decision of the Court was based on the fact that it would be inequitable for the proctor representing the Navy to have access to information which the private litigant in that tort suit was barred from receiving because of an assertion of privilege by the government.

In *Cronan* v. *Dewavrin,* 9 FRD 337 (S.D.N.Y., 1949), contrary to plaintiff-appellee's assertion, the Court did not hold that the material was privileged. The Court stated that the question of privilege should be determined by the Canadian government or its representative whose deposition was sought. In that case the witness whose testimony was potentially privileged not only had signified his willingness to testify but had signed a statement in which he had set forth the substance of his proposed testimony.

In *Bank Line* v. *United States,* 76 F. Supp. 801 (S.D.N.Y., 1948), the Court held that where the United States had consented to a suit and had not "annexed" the privilege of

non-disclosure of information, and the government filed a cross-libel, the government waived its conditional privilege of suppression of secrets which were useful in ascertaining liability and which were not diplomatic or military secrets, notwithstanding the fact that the suit was prosecuted by the Department of Justice for the benefit of Treasury Department and that the information sought was in the possession of the Navy Department.

Federal Savings and Loan Ins. Corp. v. *First National Bank,* 3 FRD 487 (W.D. Mo., 1944), held that a report on an audit of the affairs of the Building Loan Administration, a copy of which was obtained from the examining authority by a third person was not privileged matter. This has no relevance to the facts of the present case.

Zimmerman v. *Poindexter,* 74 F. Supp. 933 (D.C. Hawaii, 1974) does not concern waiver of privilege and has no factual relevance to the instant case.

(4)

In response to the argument made in the brief submitted on behalf of defendant-appellee Adsco Manufacturing Corp., that the New York Court of Appeals in *Cirale* in effect held insufficient the City's claims with respect to the need for confidentiality of these records, we rely on the argument made in our main brief. As is there indicated, the New York Court of Appeals in *Cirale* left open the question of whether these records are privileged. In our main brief we point out why we believe, under the analysis adopted by the New York courts in considering similar claims of privilege, the New York Court of Appeals, if required to reach this issue, would hold these records privileged. We also point out in that brief that, at the very

least, a remand is here required so that the District Court may pass upon our claim of privilege applying the mode of analysis which *Cirale* indicates is required in determining this issue. If nothing else is clear on this record, one thing is: Judge Knapp has never accorded our claim of privilege the type of consideration *Cirale* indicates is necessary.

CONCLUSION

The order appealed from should be reversed and the motion to quash the subpoena granted, with costs. In the alternative, the order appealed from should be reversed and the matter remanded to the District Court for consideration in light of *Cirale* v. *80 Pine St. Corp.*, 35 N Y 2d 113 (1974).

April 8, 1975.

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel,
Attorney for Appellants.

L. Kevin Sheridan,
Susan S. Belkin,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ being duly sworn, says that on the 8 day of April 1975, he served the annexed Appellant's Reply Brief upon Williams O'Neill Esq., the attorney for the Def't Con Ed. herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 130 E 15th St in the Borough of Mhtn, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 8 day of April 1975

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Carlos M Rodriguez

Form 323-40M-703823(73) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ being duly sworn, says that on the 8 day of April 1975, he served the annexed Appellant's Reply Brief upon Morris Duffy Byrne & Jensen Esq., the attorney for the Defendant Respondent herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 233 Bway in the Borough of Mhtn, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 8 day of April 1975

John Calia

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Notary Public, State of New York
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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.: CARLOS M. RODRIGUEZ being duly sworn, says that on the 8 day of April 1975, he served the annexed Appellants upon Harry H Lipsig Esq., the attorney for the Plaintiff Resp herein by depositing 3 copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 100 Church St in the Borough of Mon, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 8 day of April 19

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires

Carlos M Rodriguez

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.: CARLOS M. RODRIGUEZ being duly sworn, says that on the 8 day of April 1975, he served the annexed Appellants Reply Brief upon Craig & Green Esq., the attorney for the Deft Resp Rockefeller Corp herein by depositing 3 copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 10 Rockefeller Plaza in the Borough of Mon, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 8 day of April 19 75

John Calia

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No. 41-5573935 Queens County
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State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ being duly sworn, says that on the 8 day of April 1975, he served the annexed appellant's Reply Brief upon Hart & Hume, Esq., the attorney for the dft. Resp't. Emery Cutler & Sons herein by depositing 3 copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 10 East 40th St in the Borough of Man, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 8 day of April 1975

John Calca

Carlos M Rodriguez

JOHN CALCA
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State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ being duly sworn, says that on the 8 day of April 1975, he served the annexed appellant Reply Brief upon Quick & Bakalar Esq., the attorney for the Pet Resp 80 civ 5 herein by depositing 3 copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 444 Madison ave in the Borough of Mhn, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 8 day of April 1975

Carlos M Rodriguez

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Notary Public, State of New York
No. 41-5573935 Queens County
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Commission Expires March 30, 1976

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ being duly sworn, says that on the 8 day of April 19 he served the annexed Appellant Reply Brief upon Hanner Ondrato & Hogusty Esq., the attorney for the Def Resp Atsko Mfg Corp herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No 1633 Bway in the Borough of Manh, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 8 day of April 1975

Carlos M Rodriguez

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